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Supreme Court of the United States

OCTOBER TERM, 1940

No. 778

NEW JERSEY WORSTED MILLS,
Petitioner,

against

OLIVE RIPLEY GNICHTEL, HENRY A. SCHWEDES and FEDERAL TRUST COMPANY, Executors of the Will of Edward E. Gnichtel.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LAURENCE ARNOLD TANZER,
Counsel for Petitioner.

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I.

Respondents' brief (pp. 6, 7) cites *Botany Worsted Mills* v. *U. S.*, 278 U. S. 282, as holding that the so-called "closing agreement" provisions by implication authorize the Commissioner to reopen any determination where there has been no closing agreement. That case does not so hold: it holds that a closing agreement may be made only by the method provided by statute; it does not hold that the Commissioner may not complete his action and exhaust his jurisdiction in the absence of a closing agreement (cf. *Castell* v. *U. S.*, 98 F. [2d] 88, 91 [C. C. A. 2], certiorari denied 305 U. S. 652).

II.

At pages 11 and 12 of respondents' brief, respondents argue the question as to the Collector's liability for the entire amount of the additional assessments collected by him, partly in cash and partly by application of a credit in favor of Gera Mills, a subsidiary of petitioner—a question which the Court below expressly refused to consider

(R. 133, 134) and which is therefore not presented by the present petition.

(a) The statement at page 12 of respondents' brief that "the Collector here did not, as in *U. S.* v. *Bertelsen & Petersen Co.*, 306 U. S. 276, make the original collection of the taxes" is erroneous. The Collector here did make the collection and did make the credit which he accepted in part payment. He demanded of plaintiff payment of the entire amount (R. 56, 57) and issued warrants of distraint for its collection (R. 57). After obtaining permission from the Commissioner to do so he applied the overassessment as a partial payment on the collection which he was making, and collected the balance in cash (R. 33, 35, 57, 58, 84, 117, 118, 122-127).

(b) *Lowe Bros. Co.* v. *U. S.*, 304 U. S. 302, does not, as argued at page 11 of respondents' brief, hold that the Collector is not liable for taxes so collected. In that case, the credit was made by the Commissioner, not as in this case by the Collector, and the Collector was held not liable because "no suit will lie unless he collected the tax"; or, as explained in *U. S.* v. *Bertelsen & Petersen Engineering Co.*, 306 U. S. 276, 281, because the Collector "did not make or authorize the credit".

(c) In any view, the claim that the Collector was not liable for the portion collected by credit, even if sustained, would not, as argued at page 11 of respondents' brief, support the decision below. Concededly, that claim constitutes no defense as to the $66,876.12 paid in cash, but applies only to so much of the tax ($133,853.50) as was paid by credit (R. 35).

III.

A writ of certiorari should be granted as prayed in the petition.

Respectfully submitted,

LAURENCE ARNOLD TANZER,
Counsel for Petitioner.